

Hyer's Response

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

In re:

RAYMOND T. HYER, JR.,

Debtor,

Chapter 11

Case No. 92-20777-BKC-RBR

In re:

GARDNER INDUSTRIES, INC.;
GARDNER ASPHALT CORPORATION
(NEW JERSEY);
GARDNER INTERNATIONAL
OPERATIONS LIMITED;
GAC TRANSCO, INC.;
GARDNER-OVERALL, INC.;
GAC-TRUCKING CO., INC.;
AMERICAN LAVA COATINGS CORP.
APOC OF COLORADO, INC.;
ASPHALT PRODUCTS OIL CORPORATION;
GARDNER ASPHALT COMPANY;
GARDNER ASPHALT CORPORATION
(DELAWARE);
GARDNER ASPHALT CORPORATION
OF DELAWARE
GARDNER ASPHALT, INC.,

Debtors.

Consolidated Case Numbers

92-20779-BKC-RBR

92-20780-BKC-RBR

92-20781-BKC-RBR

92-20782-BKC- RBR

92-20783-BKC- RBR

92-20784-BKC- RBR

92-20785-BKC- RBR

92-20786-BKC- RBR

92-20787-BKC- RBR

92-30788-BKC- RBR

92-20789-BKC- RBR

92-20790-BKC- RBR

92-20791-BKC- RBR

JOINTLY ADMINISTERED

UNITED STATES OF AMERICA

Plaintiff,

v.

RAYMOND T. HYER, JR.; GARDNER
ASPHALT CORPORATION; and EMULSON
PRODUCTS COMPANY,

Defendants.

ADV. NO. 02-2067

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**HYER'S RESPONSE TO UNITED STATES'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Raymond T. Hyer, by and through counsel, hereby responds to the Motion for Partial Summary Judgment filed by the United States of America (the "United States") as follows:

1. The United States asserts that it had inadequate knowledge of any claim against any of the Debtors in the above-styled consolidated bankruptcy cases. However, the United States does not dispute that it had timely notice of the cases. Despite that notice, the United States has not offered any evidence that it took reasonable steps in response to the notice. For example, did the United States' counsel contact the Debtors' counsel to inquire why the United States was scheduled (ten times) as a creditor? Did the United States even order a copy of the schedules prior to the deadline for creditors to file proofs of claim? As well, did the United States avail itself of the opportunity to attend the Section 341 meeting of creditors to make inquiry there? A creditor ignores notice of a bankruptcy case at its peril. It cannot turn a blind eye on the case, decline to become involved at all, and then, years and years down the road, claim no knowledge of the existence of its claim.

2. Prior to the hearing on the motion, Mr. Hyer will seek judicial notice of pages 256-257 of the corporate debtors' Schedule F of unsecured creditors as well as the unnumbered pages in his own Schedule F that list the same ten claims for the "U.S. Environmental Protection Agency" as well as a page prior to that list that says: "The following scheduled debts are contingent, disputed, unliquidated, and are unknown as to amount." He will also seek judicial notice of two certificates of mailing of the notice of commencement of the bankruptcy cases, which notice provides creditors with notice of the Section 341 meeting of creditors as well as the bar date for filing proofs of claim.

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3. The United States' own reports suggest that the United States stopped short in its initial assessment of the subject site. Had the United States undergone all of the testing suggested by its expert, it would have not treated the site so casually for so many years. When it finally did comprehend the real situation at the site, it took the steps necessary to ascertain that it allegedly held claims against the corporate defendants and Mr. Hyer. Mr. Hyer relies on and adopts the responses of the corporate defendants with respect to the issue of when the United States should have known of the existence of its alleged claims.

4. Should this Court determine, as the defendants urge, that the United States' claims arose as a matter of law prior to the time the bankruptcy cases were filed and are thus now discharged, the United States relies on equitable tolling to overcome its failure to timely seek a determination under 11 U.S.C. Section 523(a)(6) of the dischargeability of its asserted claim against Mr. Hyer. The United States cannot meet its burden to show entitlement to equitable tolling, however, primarily because it cannot establish that it acted diligently once it finally took the reasonable steps it should have taken earlier to discover the existence of its alleged claim. In its response to Mr. Hyer's motion for summary judgment, the United States concedes knowledge as early as 1996. The United States' motion to reopen the bankruptcy case for the purpose of seeking a determination of dischargeability as against Mr. Hyer was not filed until September of 2001, some *five* years later. Certainly there is some outside limit to how long a litigant can sit on its rights in reliance on equitable tolling once it discovers those rights and still be considered diligent. Mr. Hyer suggests that the instant facts are aptly analyzed with reference to Rule 60(b), Federal Rules of Civil Procedure, made applicable to matters and proceedings in bankruptcy cases by Rule 9024, Federal Rules of Civil Procedure. Under Rule 60(b) litigants have up to one

year to pursue relief from a judgment based on newly discovered evidence or fraud, arguments the United States advances in this proceeding.

5. The application of equitable tolling requires a showing of several factors: 1) lack of actual notice of the filing requirement, 2) lack of constructive notice of the filing requirement, 3) the diligence used by the United States in pursuing its rights, 4) absence of prejudice to Mr. Hyer, and 5) the United States' reasonableness in remaining ignorant of the notice requirement. *See In re Romano*, 262 B.R. 429 (Bankr. N.D. Ohio 2001). The first two factors are resolved in Mr. Hyer's favor because the United States does not dispute timely notice of the bankruptcy filings. With respect to the third factor, as indicated above, once a party becomes aware of the alleged fraud, it must act with diligence. *Id.* at 432-32. *See also Drew v. Dept. of Corrections*, 2002 U.S. App. LEXIS 14494 (11th Cir. July, 2002) (in order to be entitled to the benefit of equitable tolling, a petitioner must act with diligence). The United States cannot seriously argue that waiting five years before finally taking some action to pursue its rights as against Mr. Hyer is diligent. With respect to the fourth factor, Mr. Hyer is prejudiced because an important witness has died in the meantime, the witness the United States claims points the finger at Mr. Hyer. Should the United States be able to get into evidence a statement allegedly

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written by the witness*, Mr. Hyer has no way to cross-examine the witness now. In addition, Mr. Hyer must incur the expense to defend allegations that he assumed were resolved with the confirmation of the plan of reorganization in bankruptcy cases. On the last factor, for the same reason that the United States' alleged claims arose prior to the bankruptcy filings – because it should have known of them with the exercise of reasonable diligence, so too did the United States act unreasonably in remaining ignorant of its alleged claims. The United States is not entitled to the application of equitable tolling for these reasons, and its Second Claim for relief – brought under Section 523(a)(6) -- should be dismissed as untimely.

6. Assuming that the United States had acted diligently in pursuing a dischargeability proceeding against Mr. Hyer and thus could prove entitlement to the application of equitable tolling, there exists a fact dispute concerning Mr. Hyer's liability under the exception cited by the United States, 11 U.S.C. Section 523(a)(6). Prior to the hearing on the motion, Mr. Hyer will file an affidavit denying that he ever received Exhibit 9 to the United

* See Exhibit 9 to the motion. Mr. Hyer contends that the statement is inadmissible because, *inter alia*, it cannot be authenticated to be a record of a regularly conducted business activity and thus an exception to rule against admission of hearsay, F.R.E. 802, and even if part of it can be admitted as a business record, hearsay within it cannot be admitted. The United States relies on the affidavits of three persons to support the admissibility of Exhibit 9. See Exhibits 15-17. Only two of the three support an authentication of the handwriting itself. No one authenticates Exhibit 9 as a record of a regularly conducted business activity sufficient to make it admissible as an exception to the hearsay rule under F.R.E. 803(6). The first affidavit is made by the "only secretary" to the deceased witness, yet she had no recollection of seeing Exhibit 9 prior to 2001. That suggests that the document does not meet the test of F.R.E. 803(6) or else the circumstances of its preparation indicate a lack of trustworthiness. The second affidavit is by an official with the Department of Natural Resources and Environmental Control of Delaware ("DNREC"). He recites self-serving hearsay of the deceased witness and hearsay within hearsay concerning the statement allegedly made by Mr. Hyer. There is no exception to the rule against admission of hearsay by which the testimony of the DNREC official can be admitted to either authenticate Exhibit 9 as a record of a regularly conducted business activity or to admit an alleged statement against Mr. Hyer's interest or to establish that the document is an ancient document under the ancient documents exception to the hearsay rule, F.R.E. 803(16). Further, the DNREC official recites that the so-called business records were records kept by the deceased *at his home* as part of his personal records. This information undercuts the argument that Exhibit 9 is a record kept in the course of a regular business activity as required by F.R.E. 803(6). The third affidavit is by a colleague of the deceased witness, who indicates that he had no recollection of seeing Exhibit 9 prior to 2001 and that the deceased witness kept files at his home, both of which statements support Mr. Hyer's view that Exhibit 9 is not a record kept in the course of a regular business activity but rather a suspect "CYA" tactic of the deceased witness. Exhibit 9 also cannot be admitted as an ancient document because it cannot be authenticated as required by F.R.E. 901(b)(8)(B),(C). Finally F.R.E. 807

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States' motion, except in connection with the instant litigation, and denying that he ever uttered the words "bury it!" in response to any inquiry about the subject drums. The existence of such a critical fact dispute precludes the entry of summary judgment in the United States' favor on the Second Claim in its complaint. *Chapman v. Al Transport*, 229 F.3d 1012 (11th Cir. 2000).

7. More significantly, as the United States acknowledges, in order to prevail on the merits of its claim under 11 U.S.C. Section 523(a)(6), it must prove that Mr. Hyer did something with actual intent to cause injury. That intent is required by the decision of the Supreme Court of the United States in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). There is nothing that the United States has placed in the record of this proceeding to demonstrate the requisite intent to cause injury. Therefore, it has not met its initial burden of demonstrating the absence of a genuine dispute as to a material fact. Had Mr. Hyer directed someone to "bury it!" – which he did not -- that fact does not equate to a showing of any intent to cause injury. Other governmental claimants have similarly failed in their efforts to obtain an exception under Section 523(a)(6) for environmental contamination under the same test: *See In re Tinkham*, 59 B.R. 209 (Bankr. D. N.H. 1986) (although the debtor was aware that his disposal activities –the dumping of liquid wastes without a permit -- were illegal, the state did not show that the debtor knew that waste-related damage was substantially certain to occur); *In re Carracino*, 53 B.R. 513 (Bankr. D. N.J. 1985) (one can theoretically accumulate large quantities of hazardous wastes at a site without necessarily damaging the adjoining site, a river).

8. Finally, even the United States concedes (at footnote 8 of the motion) that there is no proof Mr. Hyer specified the drums were to go the Krewatch Drum Burial Area, so assuming he did tell someone to "bury it! – which he did not – such a directive cannot support the United

cannot be used to admit Exhibit 9 because Mr. Hyer has no ability to prepare to meet the exception now that the witness is deceased, so the interests of justice cannot be served by admission of Exhibit 9.

States' burden under Section 523(a)(6). If the United States has no proof that Mr. Hyer directed the drums to the Krewatch Drum Burial Area, then it has no proof that he intended any consequences whatsoever to that land. *See Carricino*, 53 B.R. at 516.

WHEREFORE, Mr. Hyer requests this Court to deny summary judgment to the United States on all claims for relief in this proceeding.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been by mail to the persons on the attached service list this 5th day of August, 2002.

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